



U.S. Department of Justice

Immigration and Naturalization Service

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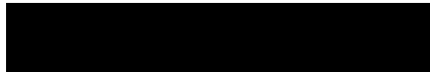
OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: LIN 99 115 50796 Office: Nebraska Service Center Date:

JAN 8 2001

IN RE: Petitioner:
Beneficiary:



Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(L)

IN BEHALF OF PETITIONER:



Public Copy

identifying information to
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Mary C. Mulrean, Acting Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner, a company that imports medical and surgical equipment, seeks to extend its authorization to employ the beneficiary temporarily in the United States as its marketing director. The director determined that the petitioner had not established that there is a qualifying relationship between the U.S. and foreign entities, or that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel argues that the petitioner meets the definition of an affiliate corporation, and that the beneficiary would be employed in an executive capacity.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

8 C.F.R. 214.2(l)(14)(ii) states that a visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and

(E) Evidence of the financial status of the United States operation.

The U.S. petitioner states that it was established in 1997, and that it is an affiliate of [REDACTED] located in Pakistan. The petitioner declares two employees. It seeks to extend the petition's validity and the beneficiary's stay for three years at an annual salary of \$25,000.

The first issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that there is a qualifying relationship between the U.S. and foreign entities.

8 C.F.R. 214.2(l)(1)(ii)(G) states:

Qualifying organization means a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (1)(1)(ii) of this section;

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and

(3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

8 C.F.R. 214.2(l)(1)(ii)(I) states:

Parent means a firm, corporation, or other legal entity which has subsidiaries.

8 C.F.R. 214.2(l)(1)(ii)(J) states:

Branch means an operating division or office of the same organization housed in a different location.

8 C.F.R. 214.2(l)(1)(ii)(K) states:

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50

percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns directly or indirectly, less than half of the entity, but in fact controls the entity.

8 C.F.R. 214.2(1)(1)(ii)(L) states, in pertinent part:

Affiliate means (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The director noted in his decision that:

The record and the additional evidence submitted indicate that [REDACTED] has purchased 1000 shares of the [REDACTED] that [REDACTED] has purchased 850 shares of [REDACTED], and that [REDACTED] has purchased [REDACTED]. It is also noted that all the share certificates have been signed by the president, [REDACTED]. No evidence, however, has been submitted to establish who owns [REDACTED] and how many shares are owned by each owner, if there are more than one.

On appeal, counsel argues that:

The ownership shares of [REDACTED] is irrelevant to whether it is an affiliated company as [REDACTED] is a Pakistani corporation which owns 50 percent of its American affiliate. Accordingly, it is an independent entity. Moreover, The Articles of Incorporation of [REDACTED] Ltd., the Pakistani parent company does show the share ownership of the corporation contrary to the assertion of the Service.

Accordingly, [REDACTED] Inc. meets the definition of an Affiliate pursuant to 8 C.F.R. 214.2(1)(1)(ii)(L). That is, 50 percent of the American company is owned by the [REDACTED] Corporation. Thirty Five (35%) is owned by [REDACTED] and (15%) is owned by [REDACTED] Marketing Director for both the American and Pakistani corporations. Further, [REDACTED] Ltd. is owned by the [REDACTED] family, including the applicant [REDACTED]. In addition,

the Board of Directors of the parent Pakistani corporation and of [REDACTED] are interlocking.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

Counsel's argument is not persuasive. As the petitioner has not established ownership and control of both the U.S. and foreign entities, it cannot be determined whether there is a qualifying relationship between the two entities. For this reason, the petition may not be approved.

The other issue in this proceeding is whether the beneficiary has been and will be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

"Managerial capacity" means an assignment within an organization in which the employee primarily-

- i. manages the organization, or a department, subdivision, function, or component of the organization;
- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

"Executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision-making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner describes the beneficiary's duties as follows:

The primary responsibility of [the beneficiary] is that of a sales and marketing director of the medical and surgical equipment in a highly technical field. Before the end product can be sent to the United States with FDA approval he must supervise and ensure that all employees in production of the product in Pakistan produce the products in compliance with FDA requirements. In addition, he supervises the packaging, labeling, stamping quantity and quality of the product before it is shipped in accordance with FDA requirements. This is conducted by fax and telephone with managerial employees in the Pakistani affiliate. Moreover, through the US affiliate he ensures that all brokers utilized by the company for sales domestically comply with all FDA requirements.

The director noted that although the beneficiary appears to meet the executive and managerial criteria as a manager of 15 employees in Pakistan, the evidence of record indicates that there are only

two employees in the U.S. company. The director concluded that the beneficiary was "directly performing the duties of the company."

On appeal, counsel argues that:

The Service position that [the beneficiary] is the only person performing service for the corporations is preposterous. His sales staff abroad as well as himself initiate sales within the United States and other countries. He approves the sales, amounts and terms of payment and shipping arrangements handled by his staff. He does not fly to Pakistan, manufacture and crate the items, load them on a truck or drive them to the loading dock or sail the ship to the U.S. and then unload them and take them for FDA inspection or to their final distribution point in another country.

The information provided by the petitioner describes the beneficiary's duties only in broad and general terms. There is insufficient detail regarding the actual duties of the assignment to overcome the objections of the director. Duties described as supervising compliance with FDA regulations; supervising the packaging, labeling, stamping, quantity and quality control of the product; and ensuring that all brokers comply with FDA regulations are without any context in which to reach a determination as to whether they would be qualifying. The use of the position title of "marketing director" is not sufficient.

The record contains insufficient evidence to demonstrate that the beneficiary will be employed in a primarily managerial or executive capacity. The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that the beneficiary will be managing the organization, or managing a department, subdivision, function, or component of the company. The petitioner has not shown that the beneficiary will be functioning at a senior level within an organizational hierarchy other than in position title.

Further, the petitioner's evidence is not sufficient in establishing that the beneficiary will be managing a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing nonqualifying duties.

Based on the evidence furnished, it cannot be found that the beneficiary will be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.